IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 2475 of 2004
In
MISC.CIVIL APPLICATION - FOR REVIEW No. 969 of 2004
In SPECIAL CIVIL APPLICATION No. 13406 of 1993

For Approval and Signature:
HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DILIPBHAI SHALIGRAM PATIL - Appellant(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR RAMNANDAN SINGH for Appellant(s) : 1,
MR M.R. MENGDE AGP for Respondent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 20/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Instant intra-court appeal under clause 15 of the Letters Patent is filed against the order dated 31.3.2004 rendered in Special Civil Application No.13406 of 1993 by the learned Single Judge of this Court by which the petition filed by the appellant ('petitioner' for the sake of convenience) against the respondents under Article 226 of the Constitution of India, praying to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the order/notice dated 23.11.1993, Annexure A to the petition, and further prayed to issue direction to the respondents to continue the petitioner in service as armed police constable with a further direction to the respondents to allow the petitioner to appear in other three papers and to complete the training course and absorb him regularly in service like

other candidates, has been negatived and thereby the petition filed by the petitioner has been rejected. Rule issued at the time of admission of the petition has been discharged with no order as to costs and the interim relief has also been vacated.

2. The petitioner applied for the post of Armed Police Constable and after passing the interview and other tests he was selected as Armed Police Constable on 26.8.1992. He was thereafter sent for medical check up and other necessary check ups and having been found fit, by an order dated 9.11.1992, along with thirteen other candidates, he was given an offer to join service immediately. A copy of the said order was annexed to the petition at Annexure B. It was the case of the petitioner that as per the rules, the police constables are required to undergo one year training course. The petitioner joined the Railway Police Headquarters, Vadodara on 13.11.1992 and he was sent for one year training in Police Training School, Vadodara. He was in

the first batch i.e., 'D' batch and he cleared the outdoor and indoor tests successfully. In 'B' batch and 'C' batch also he cleared outdoor and indoor examinations successfully. In 'A' batch also he did firing test and also passed outdoor (ground work) test. After having cleared all these tests, he was required to appear and pass in the written examinations in five papers. On 25.10.1993 between 10.30 A.M. and 1.30 P.M. he appeared in two papers, namely, Indian Penal Code and Criminal Procedure Code. Thereafter in the afternoon between 1.30 P.M. to 2.30 P.M. he was required to appear in two papers, namely, Police Procedure and General Knowledge and on the next day he was required to appear in the last paper i.e., Minor Act. After he had appeared in first two papers on 25.10.1993, i.e., in Indian Penal Code and Criminal Procedure Code, during recess period, one S.G. Shaikh, Police Inspector (Training School) told him that he is not permitted to appear in the next papers and, therefore, the petitioner met the Principal, D.D. Tuteja and politely asked him about the matter

upon which D.D.Tuteja told him to inquire in the office. The petitioner thereafter went to the office of the school and inquired about it but he was not told anything and he was also not permitted to appear in the next papers. Thereafter Drill Inspector, Ranjanaryan Tiwari was told to send the petitioner out of Training School with his belongings and accordingly he was sent to Railway Police Headquarters. The petitioner's training period was to conclude on 31.3.1993 and just six days before he was sent out of the training school without permitting him to appear in the three papers and thereafter the petitioner continued under the police headquarters under respondent No.4. On 24.11.1993 he was served with the impugned order dated 23.11.1993 wherein it has been categorically stated that a decision has been taken to discharge him from the service and after seven days from the date of the said notice, the service of the petitioner shall stand discharged. He received the said notice on 23.11.1993 at 7.30 P.M. It was also the case of the petitioner that

he attended the training with all seriousness and sincerity all throughout. His behaviour during the training period with his colleagues and officers was good and he had at no point of time received any memo or notice about his short comings or otherwise. There is absolutely no reason as to why such a drastic step of discharging him from service was required to be taken. According to the petitioner, the only reason appears to be his not reporting for about six occasions in the night roll call on Sundays. On Sundays, they were given off, but they were required to report back and remain present in the night roll call which was held at 9.00 P.M. and if any candidate does not attend the roll call, then in the next day morning parade, he is not allowed but thereafter after seeking the explanation he was permitted to attend. It was the case of the petitioner that only on six occasions, during initial eight months, due to some domestic reasons which have been narrated by him at the relevant time to the authorities concerned, he could not attend the night roll

call and for this small reason, the authorities ought not to have imposed such major punishment of economic death. There are at least about 6 to 8 candidates who were also late in the roll calls like the petitioner for about 6 to 8 times. But they were allowed to complete the training by appearing in all the tests and they are continued in service. Thus the action of the respondents is arbitrary and violative of Articles 14 and 16 of the Constitution of India. According to the petitioner, if the Police Training School authorities find something against a candidate, they take a decision of not allowing the candidate to appear in the examination and put their names on the notice board before the commencement of the examination. In instant case, name of the petitioner did not figure in the said list and he had been allowed to appear in two tests and suddenly he was told not to appear in the next papers. Thus the action of the respondents was arbitrary and illegal. The petitioner at no point of time even till the date of filing of the petition was told by the

respondents the reason for not permitting him to appear in the examination and, therefore, the action of the respondents is highly arbitrary and illegal. The impugned order at Annexure A though termed by the respondents as notice, is in fact a communication of the decision which is to become effective after seven days. A decision which ensues civil rights and affects the entire career of the petitioner has been taken without giving any prior notice or hearing to him and, therefore, the impugned order is ex-facie bad in law and illegal and is violative of the principles of natural justice. It was the case of the petitioner that he was continued as police constable and he was likely to be relieved in the evening of 30.11.1993 according to the order at Annexure A. At no point of time he was informed about any short comings or he was served with any notice or memo and, therefore, the respondents could not have suddenly taken such a drastic step of economic death. According to the information of the petitioner, there are some candidates who were also absent for five to six

times like the petitioner in the Sunday roll call but they were permitted to compete the training whereas a strict view has been taken against the petitioner. This action of the respondents is arbitrary and violative of Articles 14 and 16 of the Constitution of India. The respondents ought to have given a notice and hearing to him before taking such a serious action of discharging him from the service as no reason is disclosed earlier or in the impugned order. The action of the respondents in discharging him from service is throughout illegal and deserves to be quashed and set aside. The petitioner also pointed out that he has got prima facie case and balance of convenience is in his favour and therefore it is a fit case wherein the interim relief as prayed for is required to be granted. The petitioner, therefore, filed the petition claiming the reliefs to which reference is made earlier.

3. The petition was placed for admission hearing before a learned Single Judge on 30.11.1993 and on that day the learned Single Judge issued

notice to the respondents making it returnable on 10.12.1993. Thereafter on 10.12.1993 the matter was adjourned to 14.12.1993 and on 14.12.1993 the matter was adjourned to 10.1.1994.

4. Pursuant to the issuance of the notice, the respondents appeared and contested the petition by filing affidavit in reply dated 16.12.1993 which was sworn by Kantilal Harilal Das, Deputy Supdt. of Police (HQ), Western Railway, Baroda, wherein, inter alia, it was stated that the petitioner, vide an order dated 9.11.1992, recruited as an Armed Police Constable. The order dated 9.11.1992 categorically stated that the appointment was purely a temporary appointment. On 16.11.1992 the petitioner was sent for training for a tenure of 8 months to the Police Training School at Baroda. During the period of training, the petitioner has, without prior permission of his superiors, remained absent from training on various dates from 28.2.1993 to 19.9.1993. In the aforesaid period the petitioner remained absent for ten days. The conduct of the

petitioner in remaining absent from training and showing irregularity in attendance frustrated the purpose of training, which was especially to be undertaken. In order to become a responsible Police Officer, it is necessary that a police officer should undertake and complete the training prescribed with utmost sincerity and care and by the aforesaid conduct of the petitioner whereby the petitioner has remained absent from training without prior permission of the superiors shows that the petitioner has been indisciplined. This attitude of the petitioner is not befitting that of a trainee/candidate who intends to become a responsible police officer. In view of the irregular attendance shown by the petitioner as a trainee, the petitioner has been given a notice (Annexure-A) by which it has been decided to discharge the petitioner from service due to his irregular attendance. It was therefore urged to reject the petition.

5. Thereafter on 11.1.1994 when the matter was placed before a learned Single Judge of this

Court (Coram: S.M. Soni, J.), this Court has issued Rule and granted interim relief in favour of the petitioner. The said order reads as under:

> "Leave to amend.
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> Rule. The legality of the order of discharge is challenged on the ground that the same suffers from the vice of non-compliance of the principle of natural justice. Non-compliance of principle of natural justice is alleged in as much as no reason for discharge are assigned in view of the order of appointment (Annexure "B") whereby the petitioner is appointed on purely temporary and ad-hoc basis. In view of the judgment in case of Anopsing vs. V.K. Gupta, the authority concerned ought to have followed the principles followed under Article 311 of the Constitution and as the same is not followed, the order of discharge appears to be prima facie bad and liable to be set aside. The order of discharge dated 23.11.1993, speaks that it shall become effective after seven days and as seven days

have passed it has become effective and it has become the order of discharge. The order of discharge is prima facie bad as observed earlier and as made out in the petition. From the affidavit-in-reply that the said order appears to have been passed because petitioner was absent for about ten days from the training school at night, however, the said absence was not consecutive. In the circumstances of the case, the order of discharge has no doubt become effective, yet I am of the view that in the facts and circumstances of the case interim relief as prayed for in para 15 (B) (i) is required to be granted. The question of his absence from the day of the order of discharge become effective till he is taken back in service shall be considered at the time of the disposal of the petition. This order as to interim relief shall not debar the department from taking action, if any, in case of any misconduct is committed by the petitioner during this time or for prior misconduct if

any found. Hence, interim relief in terms of para 15 (B) (i). D.S.”

6. Thereafter the petition was placed for final hearing before a learned Single Judge (Coram: M.R. Shah, J.) and after hearing the learned advocates appearing for the parties, vide judgment dated 31.3.2004 the learned Single Judge dismissed the petition by holding that the petitioner had remained absent without prior permission of his superior officer even during the course of training and even before he is made permanent and looking to the conduct of the petitioner during training, there is no substance in the petition and accordingly it was dismissed and rule was discharged. Interim relief was vacated.

7. Aggrieved by the order passed by the learned Single Judge, Misc. Civil Application No.969 of 2004 was filed by the petitioner for review of the order passed by the learned Single Judge. The learned Single Judge (Coram: M.R. Shah, J.) vide

order dated 30.9.2004 dismissed the review application which has given rise to instant Letters Patent Appeal at the instance of the petitioner.

8. The appeal was placed for hearing before a Division Bench of this Court (Coram: B.J. Shethna and Sharad D. Dave, JJ.) and this Court vide order dated 8.12.2004 accepted both the appeal and writ petition and the impugned order dated 23.11.1993 (Annexure -A) and the order dated 9.11.1992 (Annexure-B) are quashed and set aside and the respondents were directed to reinstate the petitioner in service on the post of Armed Police Constable on or before 31.1.2005 as if his services were never terminated by the impugned orders at Annexure A and Annexure B passed by the respondents and to grant him all consequential and incidental service benefits. However, in view of the reasonable stand taken by the authorities and their learned AGP, Mr. Dave in this matter, no order as to costs was passed.

9. Aggrieved thereby the respondents approached the Supreme Court by filing Civil Appeal No. 4058 of 2006 arising out of Petition for Special Leave to Appeal (Civil) No. 7782 of 2005. In the said matter, the Supreme Court vide order dated 11.9.2006, by relying upon its two earlier decisions in Union of India v. Narender Singh (2005 (6) SCC 106) and Union of India v. G.R. Prabhavalkar and others, (1973 (4) SCC 183) held that merely because an interim order had been passed pursuant to which reinstatement had been done, that cannot be a ground for allowing relief and, therefore, the order of the High Court cannot be maintained and is set aside. On the aforesaid finding, the Supreme Court vide order dated 11.9.2006 allowed the appeal to the extent indicated in the order and quashed and set aside the order dated 8.12.2004 passed by the Division Bench of this Court and consequently it is directed that since the High Court has not dealt with the matter on merits, the matter is remitted to the High Court for fresh consideration on merits and pursuant to this order of the Supreme

Court, this matter has been placed before this Court for deciding it on merits.

10. Mr. Ramnandan Singh, learned advocate appearing for the appellant, has raised the following contentions:

(A) The petition came to be decided ex-parte because the advocate for the petitioner was not present and therefore the matter was decided without having certain relevant facts and circumstances that the petitioner was performing his duty since last 12 years and during that period several prizes have been given to him. This aspect has not been considered by the learned Single Judge, while passing the impugned order.

(B) The learned Single Judge has shown his inability to exercise the power of review on the ground that certain materials were placed by the petitioner in review application which were not available in the Special Civil Application. Therefore, the learned Single Judge has come to

the finding that there is no error as far as previous order dated 31.3.2004 is concerned.

(C) In the materials which have been placed in review application, there are several cases where the respondent department has not only taken back the trainee who were absent during training period but even those who were absent for quite long time, their cases have been considered. Therefore, this aspect has not been considered by the learned Single Judge.

(D) Similarly situated employee, who was absent for continuous period of 40 days, has been retained in the service, whereas the petitioner who remained absent only for a period of seven days, has been discharged from service and hence there is discrimination between two similarly situated employees, which requires to be deprecated for the reason that when two persons are placed in similar circumstances, no discrimination could have been done against the petitioner. The petitioner was treated on leave

without pay and punishment of extra drill was also imposed upon him. In these circumstances it was improper on the part of the respondents that the petitioner was terminated by imposing second penalty for the same offence which is not permissible in law.

(E) The petitioner had already completed more than 12 years of service and the petitioner was sent for refresher course, which has also been completed successfully. Thus after completion of the training at police training college at Junagadh, the petitioner has been treated as permanent employee. Admittedly, there is no adverse remarks against the petitioner and the petitioner is sincere and dutiful throughout his service and as such no complaint was ever made by any staff against the petitioner during the period of his service and therefore the petitioner ought to have been retained in service by the respondent department.

(F) The petitioner has received 45 GST award and

certificates for good services rendered by the petitioner by different authorities. This shows that the petitioner was performing outstanding duties in the respondent department, satisfying authorities of the department.

(G) The punishment was already inflicted i.e., first was that he was not paid salary for seven days and was punished with physical punishment i.e., extra drill. Thus, in that circumstance, now the petitioner could not have been terminated because it will amount to second punishment and therefore also on the principal that there cannot be double jeopardy, the petitioner should not have been terminated from the service.

(H) The authorities have terminated the service of the petitioner on the ground that Special Civil Application came to be rejected but the authorities were helpless because of the finding of the learned Single Judge, otherwise, the petitioner was being continued in the service as the petitioner has shown his excellence in both

i.e., job proficiency and discipline.

11. In support of the aforesaid submissions, he relied upon the following reported decisions of the Supreme Court:

(i) The State of Orissa and another v. Ram Narayan Das, 1961 Supreme Court Reports, 606.

(ii) Ranendra Chandra Banerjee v. Union of India, 2 SCR 135.

(iii) Shesh Narain Awasthy v. State of UP and others, II LLJ Supreme Court, 99.

(iv) Malkiat Singh v. State of Punjab and others, (1996) 7 SCC 634.

(v) Jarnail Singh and others v. State of Punjab and others, AIR 1986 SC 1626.

(vi) Hardeep Singh v. State of Haryana and others, 1987 (Supp) SCC 295.

(vii) Bhagat Ram v. State of Himachal Pradesh and others, (1983) 2 SCC 442.

(viii) Ram Autar Singh v. State Public Service Tribunal and others, (1998) 9 SCC 666.

(ix) Syed Zaheer Hussain v. Union of India and

others, JT 99 (1) SC 319.

12. On the aforesaid premises, it is submitted by him that the impugned order dismissing the petition deserves to be quashed and set aside by allowing this appeal and thereby granting the prayers made in the petition. He, therefore, urged to allow this appeal.

13. In counter submission, Mr. M.R. Mengdey, learned Assistant Government Pleader for the respondents, has contended that the petitioner was sent for training for a period of eight months at Police Training School at Baroda and during that period he remained absent on various dates from 28.2.1993 till 19.9.1993 and in all he remained absent for ten days. Therefore the conduct of the petitioner in remaining absent from training and showing irregularity in attendance frustrated the purpose of training, which is especially to be undertaken. It is also asserted by him that to become a responsible police officer, it is necessary that a police

officer should undertake and complete the training prescribed with utmost sincerity and care. By the aforesaid conduct of the petitioner whereby the petitioner has remained absent from training without prior permission of the superiors, shows that the petitioner has been indisciplined. This attitude of the petitioner is not befitting that of a trainee/candidate who intends to become a responsible police officer. It is therefore submitted that the learned single Judge was right in dismissing the petition.

14. In support of the aforesaid submissions, he relied upon the following reported decision of the Supreme Court:

(i) State of W.B. and others v. Tapas Roy, (2006) 6 SCC 453.

15. On the aforesaid premises, it is submitted by him that the impugned order passed by the learned Single Judge does not call for any interference of this Court in exercise of powers conferred under clause 15 of the Letters Patent and

according to him, the appeal lacks merit and deserves to be dismissed. He, therefore, urged to dismiss the appeal.

16. This Court has considered the submissions advanced by the learned advocates appearing for the parties, considered the impugned order passed by the learned Single Judge and the averments made in the petition and the documents annexed therewith and the affidavit in reply as well as the appeal memo and the judgment delivered by the Supreme Court in Civil Appeal No.4058 of 2006 arising out of Petition for Special Leave to Appeal (Civil) No. 7782 of 2005 filed by the respondents and the reported decisions cited at the bar.

17. So far as the factual matrix is concerned, there is no dispute that the petitioner applied for the post of Armed Police Constable and after passing the interview and other tests he was selected as Armed Police Constable on 26.8.1992. He was thereafter sent for medical check up and

other necessary check ups and having been found fit, by an order dated 9.11.1992, along with thirteen other candidates, he was given an offer to join service immediately.

(i) As per the rules, the police constables are required to undergo one year training course. The petitioner joined the Railway Police Headquarters, Vadodara on 13.11.1992 and he was sent for one year training in Police Training School, Vadodara.

(ii) There is also no dispute that the petitioner remained absent for ten days between 28.2.1993 till 19.9.1993 when he was undergoing training at Police Training School at Baroda. Therefore, respondent No.3 vide order dated 23.11.1993 discharged the petitioner from service after the period of seven days from the date of receipt of the said communication on the ground that service of the petitioner was not required by the department.

18. It may be noted that the order dated 23.11.1993 is an order of discharge simplicitor without casting any stigma or penalty as the petitioner was on probation. It is settled principle of law that a probationer can be discharged from service simplicitor without stigma or penalty.

19. The contention that the petitioner served for 12 years pursuant to the interim order passed by this Court and successfully served the police department and therefore the learned Single Judge ought not to have dismissed the petition and hence the appeal is required to be allowed, has no substance. It is settled principle of law that merely because an interim order had been passed pursuant to which reinstatement had been done that cannot be a ground for allowing relief (See Union of India v. Narender Singh (2005 (6) SCC 106)(supra). The position was also noted in Union of India v. G.R. Prabhavalkar and others, (1973 (4) SCC 183) as follows:

“Mr. Singhvi, learned Counsel, then referred

> us to the fact that after the judgment of the High Court the State Government has passed an order on March 19, 1971, the effect of which is to equate the Sales Tax Officers of the erstwhile Madhya Pradesh State with the Sales Tax Officers, Grade in, of Bombay. This order, in our opinion, has been passed by the State Government only to comply with the directions given by the High Court. It was made during a period when the appeal against the judgment was pending in this Court. The fact that the State Government took steps to comply with the directions of the High Court cannot lead to the inference that the appeal by the Union of India has become infructuous."

20. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, it cannot be concluded that since the petitioner has served for 12 years pursuant to the interim order passed by this Court, the learned Single Judge ought to

have allowed the petition and this court also should allow the appeal and, therefore, this point is devoid of any merit and deserves to be rejected and accordingly it is rejected.

21. The contention that other similarly situated employees who had also remained absent for some time have been continued in service and therefore the petitioner ought to have been continued in service, has also no substance. The order dated 23.11.1993, which is impugned before the learned Single Judge, is an order of discharge simplicitor from the service without any stigma or penalty and therefore the petitioner cannot claim parity with other employees even though they remained absent. Besides this, conduct of a probationer employee is also a relevant factor to make him permanent in service. Even the nature of absentism differs from employee to employee as it depends upon the gravity of absentism.

22. Notwithstanding the aforesaid facts, even if it is considered that the order which was impugned

in the petition was not simplicitor order of discharge without stigma or penalty and is a penal order,in that case also the petitioner who is serving in police department as a constable remained absent from the training school and had no respect for discipline cannot be allowed to continue in service. This is so held by the Supreme court in the case of Tapas Roy's case (supra). In the said case, a trainee constable was discharged by an order mentioning several instances of unauthorised absence from training centre and concluding therefrom that he was not interested in the training and had no respect for discipline and,therefore, he was unsuitable for the police department. There was no allegation of moral turpitude or misconduct and no inquiry preceding the discharge order. Such an order of discharge is held strictly in terms of R.10 of W.B. Recruitment Rules for Constables, 1992 and not stigmatic as the said order neither alleged any moral turpitude or misconduct on the part of the employee and no inquiry preceding the discharge order.

23. In instant case also order dated 23.11.1993 impugned in the petition mentioned that the service of the petitioner is no more required by the department and therefore he has been discharged from the service and he was directed to be relieved from the service after seven days from the date of receipt of the said order.

24. So far as the judgments relied upon by Mr. Ramnandan Singh, learned advocate for the petitioner, are concerned, they turn on their own facts and the facts of those cases cannot be made applicable to the facts of instant case and, therefore, detailed reference to those judgments is avoided for the sake of brevity and not to burden this judgment.

25. Seen in the above context, according to us, while dismissing the petition filed by the petitioner, the learned Single Judge has committed no illegality by upholding the order of discharge of the petitioner from service and that

discharge order is a simplictior order without stigma or penalty requiring interference of this court in this intra-court appeal under clause 15 of the Letters Patent.

26. We find ourselves in complete agreement with the findings, ultimate conclusion and resultant order of dismissal of the petition passed by the learned Single Judge, as according to us, no other conclusion is possible except the one reached by the learned Single Judge on the facts and in the circumstances emerging from the record of the case. Therefore, the appeal lacks merit and deserves to be dismissed.

27. For the foregoing reasons, the appeal fails and accordingly is dismissed with no order as to costs.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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